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No. 89-1330

IN THE
Supreme Court of the United States

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, ROBERT J. LOWEN, and F. ELWOOD KYSER,
Petitioners,

v.

TIMOTHY A. BROWN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MEMORANDUM IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Court of Appeals correctly conclude that petitioners were obligated to comply with respondent's reasonable request to distribute his campaign literature to the union membership, at his own expense, before the union's nominating convention?

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STATEMENT

A. Facts.

Petitioner International Organization of Masters, Mates and Pilots ("IOMMP") is a national union, virtually all of whose members work as ship's officers or pilots, or in similar positions. Almost all of the members spend their working lives on board ship, and they are often away from home for long periods of time. As a result, it is very difficult

for a member who wishes to communicate with his fellow members about issues facing the union to do so without using the mails. The only complete membership mailing list is in the hands of the union, which can generate computerized labels at a very low cost.

This case arose when the union was about to conduct its quadrennial election of officers. Nominations were to be made at the union convention in late August, 1988, and ballots were to be mailed out at some time between ten and thirty days after the convention ended. Recognizing that it is often quite some time before members return home and collect their mail, the union allows a lengthy period of time — ninety days — between the mailing of the ballots and the deadline for their return. But the undisputed evidence in the district court was that most members return their ballots shortly after receiving them.

Brown sought to mail his campaign literature before the convention in order to encourage the membership to start considering his candidacy, and the issues he hoped to raise in the election campaign, before the deadline for making nominations. In that way, he hoped to persuade the membership that he was a good candidate, and to attract support from other members who were dissatisfied with the incumbents, but who, in the absence of a known alternative, might run for office themselves or commit themselves to support the candidacy of others.

Not surprisingly, the officers of the union, including petitioners Robert Lowen and Elwood Kyser, were not anxious to facilitate respondent's candidacy. They enjoy a monopoly over the official channels of communication within the union, which consist primarily of a union newspaper whose editorial board consists solely of the incumbent officers themselves. By the use of this medium, the officers are able to generate a steady stream of "news" articles promoting their views concerning the problems facing the union, in effect setting the agenda for decisions about the

union that the membership must make through the election process.

Accordingly, on May 9, 1988, respondent notified petitioner Kyser that he wished to send a mailing to the union's membership at his own expense, and requested information about the cost of the labels and the time that it would take to produce them. When Kyser did not respond, respondent repeated his request to petitioner Lowen, the IOMMP President, and Kyser then denied the request on June 7, insisting that no mailings would be permitted until after the convention and then only after the union had selected an "impartial" agency to supervise the balloting. The union's constitution does not expressly contain such a rule, but petitioners took the position that, because the constitution provides for the selection after the convention of a balloting committee and an "impartial balloting agency", and because such bodies are responsible for matters such as campaign mailings, no mailings could be conducted until that agency was selected. On June 15, Brown appealed this decision to the union's executive board, which denied the request on July 6, 1988.

B. Proceedings Below.

On July 11, 1988, respondent filed suit in the United States District Court for the District of Maryland, alleging that he was a bona fide candidate for union office and that petitioners had violated their obligation under section 401(c) of the Labor-Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 481(c), to honor his reasonable request that the union distribute his campaign literature at his own expense. Almost simultaneously, the Department of Labor, which had been furnished with copies of respondent's requests and of petitioners' response, wrote to respondent and petitioners explaining that the IOMMP's position was contrary to the requirements of the Act.

Respondent moved for a preliminary injunction, arguing that his request to have his literature mailed to the union membership only eight weeks before the latest date on which the ballots could be mailed was entirely reasonable. Petitioners argued that they should be permitted to insist on compliance with their practice of allowing mailings only after the candidates had been nominated and the list of nominees officially certified as eligible, although petitioners conceded that respondent was eligible to run for office. Respondent argued in response that the union's rule was contrary to law, because the regulations of the Secretary of Labor specify that a candidate is entitled to have mailings done as soon as he declares his candidacy, whether or not he has been nominated, and that in any event the focus of the inquiry should be on the reasonableness of his request, not the reasonableness of the union's rules.

District Judge J. Frederick Motz granted the preliminary injunction. He first held that, under the language of the statute, a court's focus must be on whether the candidate's request was a reasonable one, not whether the union had adopted a reasonable rule. This did not mean that unions could not adopt rules governing the conditions under which candidates could make mailings to the membership, but that such rules would not be judged merely by determining whether they were themselves reasonable; rather, a union rule could be held to be reasonable only if its application would result in the granting of all reasonable requests. Under this analysis, Judge Motz held, a request to distribute campaign literature one month before a union's convention was plainly reasonable, and a union rule that resulted in the denial of such a request was plainly unreasonable. Pet. App. 3c.

But even if the standard of review depended on whether the union's rule was reasonable, Judge Motz found the IOMMP rule at issue here to be unreasonable. Pet. App. 4c. First, any rule that forbade any pre-convention mailings would be per se unreasonable, because the dynamics of the

political process are such that in order to promote an effective candidacy, any non-incumbent candidate must promote himself to the convention delegates, who represent the various constituencies within the union, and thus to elicit their support during the post-convention election process. *Id.* Second, although the IOMMP allows a ninety-day period for return of ballots, the reason for the lengthy period is that the nature of the members' work means that many of them will not get their mail immediately. Thus, effective campaigning requires the dissemination of campaign material before the union's convention to ensure that the membership will have had a chance to see the material, digest it, and discuss it with their fellow members before they return to their homes and see and mail their ballots. *Id.* at 5c-6c.

Petitioners then appealed to the court of appeals, which upheld the preliminary injunction. In an opinion by Judge Russell, who was joined by Judge Widener, the court noted that the Secretary of Labor had considered respondent's request and had specifically ruled that it was a reasonable one whose denial would be a violation of the Act. This conclusion, the court noted, was entitled to judicial deference. Pet. App. 7a-8a. Moreover, the majority continued, the section 401(c) requirement of union mailings of campaign literature was adopted by Congress for the precise purpose of eliminating one of the advantages of incumbency — *i.e.*, the incumbents' otherwise-exclusive control over the membership list. Pet App. 9a. Yet the effect of the union's rule barring campaign mailings before the convention was to delay the beginning of a non-incumbent's campaign and thus to reduce the time within which he could appeal to the electorate. *Id.* 10a. Moreover, petitioners' principal justification for the rule — the prevention of discrimination among candidates — was sheer makeweight because any candidate could have exercised the right to make a reasonable request just as respondent Brown had done. *Id.* 11a-12a. Finally, the

majority ruled that the focus of judicial analysis must be the reasonableness of respondent's request, not the reasonableness of petitioners' rule. *Id.* 13a-14a. Here, the union had not denied that the member's request was a reasonable one, *id.* 13a, and so the relief granted by the district court was appropriate. *Id.* 15a.

Judge Hall dissented. He concluded that because the IOMMP had established procedures for mailings, a member's request had to be considered improper if it contravened those established procedures. *Id.* 18a. To support this extraordinary proposition, he relied on dicta in this Court's ruling in *Steelworkers v. Sadlowski*, 457 U.S. 102, 117 (1982), to the effect that a different part of the LMRDA was not intended to "undermine union self-government." Pet. App. 19a. According to Judge Hall, a union's rule must be followed unless the court decides that the union has "unfairly distorted the normal democratic process to favor the incumbents," *id.*, a showing that Judge Hall felt had not been made in this case. Judge Hall also invoked the analysis of the Third and Ninth Circuits that had, in the context of different section 401(c) claims, indicated that the proper approach was to decide whether the union's rule was itself reasonable. *Id.* 19a-20a, *citing Donovan v. Carpenters Philadelphia District Council*, 797 F.2d 140 (3d Cir. 1986); *Marshall v. Meat Cutters Local 274*, 623 F.2d 1322 (9th Cir. 1980). Judge Hall acknowledged, as neither of those cases had done, the need to defer to administrative interpretations of the Act, but he concluded that deference was improper here because the Secretary's view seemed contrary to "reasonable statutory interpretation" and to one of her own regulations which encouraged unions to adopt rules governing campaign mailings, but did not specify the required contents of such rules. Pet. App. 21a n.2, *citing* 29 C.F.R. § 452.67.

The court of appeals granted rehearing *en banc*, and the Secretary of Labor entered the case in support of the position of respondent Brown, filing a brief as *amicus curiae*

and participating in oral argument. The *en banc* court reaffirmed the decision of the panel, with eight judges adopting the majority panel opinion as their own. *Id.* 2b. One additional circuit judge agreed with the dissenting opinion, explaining that it was automatically unreasonable for a member to request a special exemption from a union rule, and that such a request would be per se unreasonable unless the rule itself was "unfair or arbitrary." *Id.* 3b-4b.[1]

REASONS FOR DENYING THE WRIT

Although the Question Presented Is Important, The Outcome of this Case Does Not Depend on Its Resolution, and the Issue Deserves Further Development in the Lower Courts Before the Court Decides Whether Review Is Required.

1. On the surface, the quarrel raised by the petitioners with the decision below — that the court focused on the reasonableness of Brown's request rather than the reasonableness of the union's rule — may seem like an

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[1] While petitioners' suggestion of *en banc* consideration was pending, the IOMMP election was completed, and respondent lost by a small margin. However, the Secretary of Labor has sued to set aside that election and conduct a new one, on several grounds, including extensive ballot fraud; the issue of the timing of campaign mailings will likely arise during that rerun election. Additionally, while the case was before the court of appeals, respondent represented that he would seek to exercise the same right in petitioners' next regularly scheduled election. Obviously, cases such as this one, as is typical of cases involving election procedures, *e.g.*, *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974), arise quickly and are normally resolved on an expedited basis based on a motion for a preliminary injunction. Accordingly, although respondent's original request has been granted and the complaint itself is moot, the issue is capable of repetition yet evading review, and the lower court had jurisdiction to decide this case.

exercise in question-begging. After all, in the end a court will have to decide the question of reasonableness, and in making that decision it will have to weigh the same combination of factors including the interests of the union as an institution and the interests of the candidate, in light of the Congressional objective of union democracy.

But there are two reasons why the difference between these two approaches is significant. First, if unions are entitled to adopt reasonable rules limiting the right to do campaign mailings, the implication is that there is some range of permissible rules, some of which allow more mailings or make them easier, and some of which allow fewer mailings or make them more difficult to accomplish, and that the union's decision to impose limitations will be upheld so long as its rule falls within the range of reasonableness. In effect, the courts reviewing a dispute between the union and the candidate would defer, to a greater or lesser degree, to the union's judgment about the balancing of interests. By contrast, if the issue is the reasonableness of the request, it is the candidate who is entitled to choose, and the courts would require the union to honor that choice so long as the member has acted within the range of reasonableness.

Second, a rule is presumably reasonable so long as, in most instances, it would meet the legitimate interests of candidates without unduly harming the institutional interests of unions. The facts that there may be some small number of candidates whose legitimate interests would be ill served by the rule, or that a more perfect rule could be devised without great difficulty, would not be a ground for insisting that the candidate's request be honored. If the law requires compliance with any reasonable request, however, the fact that the request is contrary to a rule that would allow most reasonable requests to be honored would be no defense.

In effect, then, respondent's focus on the reasonableness of the request is likely to result in the

allowance of more campaign mailings, while petitioners' focus on the reasonableness of the rule — assuming that most election rules tend to favor incumbents because of the manner in which they are enacted and enforced — is likely to make it harder for insurgents to exercise this right. Moreover, a focus on the reasonableness of the request is likely to facilitate the litigation of disputed requests in the context of preliminary injunction proceedings (which are the only way to resolve controversies that arise in the course of an ongoing election), because the litigation can focus on the single request rather than on the possible inequities of the union's entire system. That is why, apart from the hostilities that frequently accompany heated electoral challenges, petitioners (the incumbents of the IOMMP) and respondent (a member of a long-time insurgent group within the IOMMP) are so interested in the legal question in this case.

2. Thus, we agree with petitioners that the issue of the standards governing union members' requests to have the union do campaign mailings is an important question of federal law whose resolution by this Court may ultimately be required. We do not, of course, share petitioners' view that the desire to minimize intervention in union affairs requires courts to give as crabbed an interpretation as possible to the standards that are incorporated in the LMRDA. To the contrary, the Court has viewed limitations on the ability to run for union office with a jaundiced eye, *e.g.*, *Steelworkers Local 3489 v. Usery*, 429 U.S. 305, 309-313 (1977), and there is no reason to conclude that union efforts to restrict a candidate's ability to wage a vigorous campaign should be given any more weight. Nor is there any reason to believe that Congress intended the courts to assess such restrictions by deciding whether the candidate complied with a "reasonable rule," because other sections of the LMRDA make plain that when Congress intended that the focus of the inquiry be on the union's rule, it used language precisely directed to that end. *E.g.*, LMRDA

Section 101(a)(1), 29 U.S.C. 411(a)(1) (subjecting the right to vote to "reasonable rules and regulations in the union's constitution"); LMRDA Section 401(e) (subjecting right to run for office to "reasonable qualifications uniformly imposed").

Instead, we believe that the Question Presented is important because section 401(c)'s requirement that unions comply with "all reasonable requests of any candidate" for membership mailings of campaign literature is one of the most important protections for democratic elections that the Act contains. Accordingly, any decision that would in any way undermine that right would be a serious candidate for review by this Court.

3. We also agree with petitioners that the decision in *Donovan v. Carpenters Philadelphia District Council*, 797 F.2d 140 (3d Cir. 1986), follows an analysis that is squarely at odds with the principal analysis of the court of appeals below. Although the decision is factually distinguishable, and indeed supports the preliminary injunction entered in this case, if the differences in analysis were to continue, we would agree that the Court should step in and adopt the approach of the court below here.[2]

Nevertheless, this Court need not resolve the Question Presented at this time. This case represents the first time that any court of appeals has taken a hard look at the statutory language and at the policy considerations that

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[2] We do not agree with petitioners that the analysis in *Marshall v. Meat Cutters Local 274*, 623 F.2d 1322, 1325-1326 (9th Cir. 1980), is contrary to the analysis of the court below. In *Meat Cutters*, the Secretary seemed to have assumed that the rule was reasonable and argued that its application on the particular facts of that case was unreasonable. In considering that argument, the court did state that the Secretary's attempt to focus on the particular application of the rule was inconsistent with the very existence of a rule, *id.*, but the court never focused on the analytic distinction between the reasonableness of the rule and the reasonableness of the request.

support resolution of section 401(c) case in favor of any reasonable request, rather than looking only to the reasonableness of a union's rule. The focus on the union's rule, on the other hand, would permit a court to defer to the union leadership's judgment about what campaign activities by non-incumbents ought to be permitted, although such deference would be inconsistent with Congress' judgment that access for insurgent candidates to the union membership through the membership mailing list was a key form of equalization of campaign resources in order to ensure a fair contested election. The decision below also represents the first time that a court of appeals considering a claim under section 401(c) has acknowledged the need to defer to the statutory interpretation of the Secretary of Labor, which squarely supports the decision below; neither *Carpenters* nor *Meat Cutters* paid any heed to this rule of judicial deference. These differences, coupled with the fact that the Fourth Circuit has ruled *en banc*, while the Third and Ninth Circuit rulings were only by three judge panels, support the view that, if left to their own devices, the courts of appeals may well sort this issue out for themselves and avoid the need for this Court to add it to its own docket.

4. Review is also inappropriate here because the resolution of the "reasonable request" versus "reasonable rule" dispute will not affect the outcome of this case. As we have noted, the district court squarely held that the union's rule barring mailings before the union's convention was itself unreasonable. *Supra* at 4-5. The court of appeals strongly suggested agreement with this holding when it characterized the union's rule as having the "manifest effect" of "delay[ing] the insurgent candidate in beginning his campaign," while the incumbents continue to enjoy the advantages that their exclusive control of the membership lists give them to communicate with both the members and influential local officers: "The advantages . . to the incumbent cannot be questioned." Pet. App. 10a-11a. Thus, the court of appeals recognized that Title IV does not

prevent union officers from monopolizing communications through normal channels throughout their terms of office. Thus, the court concluded, a rule barring mailings before the convention has the unfair effect of perpetuating that monopoly until just before the voting begins.

Certainly the court below did not "preclude consideration" of the union's rule, as petitioners' Question Presented suggests. Thus, even if petitioners persuade the Court that, in considering the reasonableness of a member's request, a lower court must weigh the reasonableness of the union's rule, the result will not be reversal of the preliminary injunction entered in respondent's favor. Accordingly, the court should wait for a case in which the difference in approaches would be decisive, after the issue has been further aired in the lower courts.

CONCLUSION

The petition for a writ of certiorari should be denied.

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